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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS

NUMBER 04–960518

USE TAX FOR THE PERIOD 1993–95

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ISSUE

The taxpayer disputes assessments of use tax on certain items of tangible personal property. The issue is as follows:

I. Use Tax—Exemptions—Environmental Quality Compliance

Authority: IC §§ 6-2.5-3-4(a)(2), -5-1 to -3(b), -5-5.1(b) and -6, -5-30 and -8.1-5-1(b), 26-1-7-102(1)(h), -204(1) and -403(1)(b) (1993); *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S.Ct. 1274 (U.S.), *reh'g denied* 71 S.Ct. 31 and 32 (1949); *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434 (7th Cir. 1988); *Youngblood v. State*, 515 N.E.2d 522 (Ind. 1987); *Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520 (Ind. 1983); *H.J. Heinz Co. v. Chavez*, 140 N.E.2d 500 (Ind. 1957); *Day v. Ryan*, 560 N.E.2d 77 (Ind. Ct. App. 1990); *Mumma Bros. Drilling Co. v. Department of Revenue*, 411 N.E.2d 676 (Ind. Ct. App.), *reh'g denied* (1980); *Asbury v. Indiana Union Mutual Insurance Co.* 441 N.E.2d 232 (Ind. Ct. App. 1982); *Indiana Dep't of State Revenue v. Commercial Towel & Unif. Serv.*, 409 N.E.2d 1121 (Ind. Ct. App. 1980); *American Family Mut. Ins. Co. v. Bentley*, 352 N.E.2d 860 (Ind. Ct. App. 1976); *Indiana Dep't of State Revenue v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Fleckles v. Hille*; 149 N.E. 915 (Ind. App. 1925); *White River Envtl. Partnership v. Department of State Revenue*, 694 N.E.2d 1248 (Ind. Tax 1998); *Indianapolis Fruit Co. v. Department of State Revenue*, 691 N.E.2d 1379 (Ind. Tax 1998); *Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue*, 650 N.E.2d 1223 (Ind. Tax 1995); *Indiana Waste Sys. of Ind., Inc. v. Indiana Dep't of State Revenue*, 633 N.E.2d 359 (Ind. Tax 1994); *Home Insurance Company v. Aurigemma*, 45 Misc.2d 875, 257 N.Y.S.2d 980 (1965); 45 IAC §§ 2.2-5-1(a), -3(a) and (c)(1), -4(a), -10(k) and -70 (1992); 355 IAC

chs. 2-2 to -9 and art. 5 (1992); Sales Tax Information Bulletin No. 9, "Agricultural Production Exemptions" (1992)

The taxpayer claims that the acquisition and use of the items in question was to comply with certain environmental quality regulations, and was therefore exempt from use tax.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation. During the audit period the taxpayer was, and still is, engaged in the business of storing fluid bulk fertilizer and bulk liquid herbicide (hereafter "fertilizer" and "herbicide," respectively) for several nationally and internationally known agricultural chemical manufacturers.

The taxpayer also performed several activities concerning the herbicide. Before an herbicide manufacturer leasing storage space from the taxpayer sold its product to the end consumer, the taxpayer agitated and filtered the herbicide. The taxpayer performed this agitation and filtering to screen out any impurities that had crystallized in the herbicide during shipment to, or while in storage after receipt by, the taxpayer, and to recombine any component chemicals that had separated during storage. Occasionally the taxpayer mixed additives into the herbicide if the end consumer needed them. Lastly, the taxpayer packaged some orders of herbicide into what have come to be called "minibulk" containers, owned by the herbicide manufacturer but transported to the end consumer's premises to facilitate the latter's application of the herbicide. However, the taxpayer performed all of the foregoing actions solely on the respective herbicides of its various manufacturer lessees ancillary to the taxpayer's warehousing operation. The taxpayer did not buy any herbicide that any of its manufacturer lessees had in storage before doing so, and it did not and does not produce any herbicide itself. There is also no evidence in the record before the Department, nor does the taxpayer contend, that it produced any of the additives it sometimes mixed into the herbicide. The taxpayer has also failed to provide the Department with any description or evidence of any activities, other than storage, in which it may have been engaged concerning fertilizer.

Between 1990 and 1995, anticipating an increased demand for agrichemical warehousing, the taxpayer built three buildings to store fertilizer and herbicide and to repackage herbicide (hereafter "the buildings"). In 1991 certain state regulations, discussed below, were promulgated and took effect concerning commercial fertilizer and pesticide (including herbicide) storage. On April 29, 1994 the Office of the Indiana State Chemist and Seed Commissioner (hereafter "the State Chemist"), the promulgating agency, certified in writing that two of the buildings complied with these regulations. The certificate, a copy of which the taxpayer submitted in evidence in this protest, identifies them as Buildings 1 and 2. The taxpayer also submitted photocopies, and summaries, of invoices it paid to the various entities that contributed construction labor and materials to Building 2 and to a Building 3. The taxpayer did not submit any certificate from the State Chemist about Building 3. The State Chemist's certificate indicates that Building 1 contains three fertilizer and thirty-four herbicide tanks, while Building 2 contains fifty fertilizer tanks. There is no evidence in the record clearly indicating the number or type of storage tanks that Building 3 may contain.

In each year of the audit period the taxpayer acquired items of tangible personal property from various suppliers that the field auditor divided into two categories, "Expense Purchases" and "Capital Assets," in the Audit Summary. The auditor assessed tax on the use of all items in both of these categories. The taxpayer timely protested these parts of the assessments. However, it has since restricted its protest to certain specified items in each of these categories, as set out in Exhibit B of the taxpayer's September 12, 2000 affidavit (hereafter "the disputed expense purchases" and "the disputed capital assets," respectively; collectively, "the disputed items"). The disputed expense purchases consist of a CRS shaft, snap rings and tap; belting, steel tubes, a bag filter and accessories related to each of these respective items; a pail unit; an adaptor; a vise and valve; cable; an envelope seal; tubing and mesh; a pneumatic swivel castor; machine screws and washers; and two units of what appears to be sheet metal. The disputed capital assets are six horizontal tanks with four support saddles each; twelve mild steel tanks; two undescribed tanks; pipes, tees and fittings; six above-liquid manway assemblies; one hundred forty-eight (148) loads of fill dirt; five hundred twenty-three (523) tons of stone; and an item described as "material portion of contract."

I. Use Tax—Exemptions—Environmental Quality Compliance

DISCUSSION

A. INTRODUCTION: ISSUE, ANALYTICAL FRAMEWORK AND BURDEN OF PROOF

IC § 6-2.5-3-4(a)(2) (1993) exempts from use tax the storage, use and consumption of any tangible personal property that is wholly or partially exempt from gross retail tax under any part of IC chapter 6-2.5-5 except IC § 6-2.5-5-24(b). The taxpayer argues that the disputed items are exempt from use tax under IC § 6-2.5-5-30 (1993) and its implementing regulation, 45 IAC § 2.2-5-70 (1992) (hereafter collectively "the environmental quality exemption").

It is important to emphasize at the outset that the issue in this protest is whether the taxpayer has complied with IC § 6-2.5-5-30, not some other tax benefit statute. As noted in the Statement of Facts, the taxpayer submitted in evidence a certificate from the State Chemist that Buildings 1 and 2 complied with the containment regulations. The purpose of the State Chemist's doing so was to enable the taxpayer to qualify these buildings for the deduction that IC § 6-1.1-12-38 provides. This statute deals with a deduction from the assessed value of property in computing property tax, and is under the jurisdiction of the State Board of Tax Commissioners ("Tax Commissioners"). In contrast, IC § 6-2.5-5-30 grants an exemption not from the property tax, but from excise taxes, i.e. the gross retail and use taxes that this Department administers.

Aside from these basic distinctions, the two statutes use materially different language, which impose different requirements. IC § 6-2.5-5-30 is more general, enabling a sales or use taxpayer to obtain an exemption for tangible personal property predominantly used and acquired to comply with any environmental statute, regulation or standard. In contrast, IC § 6-1.1-12-38 is specific, citing only to the commercial fertilizer containment and pesticide containment regulations and the respective statutes authorizing them. A property taxpayer need only file a

certified statement from the Tax Commissioners in duplicate, and a certification by the State Chemist of the improvements made, with the county auditor by May 10 of the year before the first year in which the taxpayer will take the deduction. IC § 6-1.1-12-38(b). In contrast, as the Department will discuss below, a sales taxpayer or use taxpayer seeking exemption under IC § 6-2.5-5-30 has the burden of proving that it complied with the statute. As the Department will also detail below, this statute contains several factual elements. Accordingly, whatever conclusive effect the State Chemist's certificate might have in a proceeding before the Tax Commissioners, it is not binding on the Department in this protest, although the Department does consider it to be relevant evidence.

The taxpayer has the burden of proving that its use of each of the disputed items falls under the environmental quality exemption. IC § 6-8.1-5-1(b) (1998) imposes on all protesting persons the burden of proving the assessment to be wrong. It is also well-settled Indiana law that "[t]ax exemptions are strictly construed against the taxpayer and in favor of the state." *Monarch Steel Co. v. State Bd. of Tax Comm'rs,* 669 N.E.2d 199, 201 (Ind. Tax 1996), citing *Greensburg Motel Assocs., L.P. v. Indiana Dep't of State Revenue,* 629 N.E.2d 1302, 1304 (Ind. Tax 1994). Thus, "[w]hen a taxpayer claims entitlement to a tax exemption, the taxpayer bears the burden of showing that the terms of the exemption are met." *Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue,* 650 N.E.2d 1223, 1227 (Ind. Tax 1995) ("*Mechanics Laundry*") *Accord, White River Envtl. Partnership v. Department of State Revenue,* 694 N.E.2d 1248, 1250 (Ind. Tax 1998) ("*White River Environmental Partnership*"); *Indianapolis Fruit Co. v. Department of State Revenue,* 691 N.E.2d 1379, 1383 (Ind. Tax 1998) ("*Indianapolis Fruit*").

B. THE TAXPAYER'S ARGUMENT

The taxpayer makes three arguments to support its claim that its use of the disputed items falls under the environmental exemption. First, it asserts that these items are entitled to the exemption because the actions the taxpayer performs on or to the herbicide occur during production (i.e., processing, refining or agriculture). Second, it contends that it acquired and used the disputed items to comply with certain regulations the State Chemist promulgated in 1991 concerning commercial fertilizer and pesticide (including herbicide) storage and containment. LSA Doc. # 90-115(F), secs. 3-10, 14 Ind. Reg. 1388, 1389-1400 (1991), codified at 355 IAC chs. 2-2 to -9 (1992) and as amended at *id.* (1996 and Cum. Supp. 1999); LSA Doc. # 90-116(F), 14 Ind. Reg. 1400 (1991), codified at 355 IAC art. 5 (hereafter "the commercial fertilizer containment regulation" and "the pesticide containment regulation," respectively, or collectively "the containment regulations"). Lastly, the taxpayer contends that the facilities were built and equipped to comply with certain other unspecified federal and state environmental quality regulations concerning the handling, secondary containment, and reporting requirements associated with the manufacture and storage of hazardous materials, including herbicides. However, the taxpayer has not cited to any of the other hazardous materials laws or regulations with which it alleges that it was also trying to comply. Accordingly, the Department rules that the taxpayer has waived this last argument and will restrict its discussion to the taxpayer's production and containment regulation arguments.

C. SUMMARY OF FINDINGS

The Department finds that the taxpayer has failed to satisfy IC § 6-2.5-5-30(2). Specifically, it has failed to prove that its activities are production. The taxpayer also has failed to prove under IC § 6-2.5-5-30(1) that it acquired and used the shower/eye wash for the purpose of complying with the containment regulations.

D. THE ENVIRONMENTAL QUALITY EXEMPTION AND ITS ELEMENTS

1. The Statute

During the audit period and at the time of the audit the relevant portion of IC § 6-2.5-5-30 read as follows:

> Sec. 30. Sales of tangible personal property are exempt from the state gross retail tax if:
>
> (1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure *predominantly used and acquired* for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and
>
> (2) the person acquiring the property is *engaged in the business* of manufacturing, processing, refining, mining, or agriculture.

Id (emphases added). Title 45 IAC § 2.2-5-70(a), the relevant part of the implementing regulation, combines and is substantially identical to IC § 6-2.5-5-30(1) and (2).

2. The Environmental Compliance Requirement

IC § 6-2.5-5-30(1) and (2) each impose a primary requirement for tangible personal property to qualify for the environmental exemption. First, the "device, facility, or structure" in connection with which the tangible personal property is used must be "predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards[.]" IC § 6-2.5-5-30(1). The Department will hereafter refer to this language as imposing "the environmental compliance requirement."

3. The Production Requirement

Second, "the person acquiring the property [must be] engaged in the business of manufacturing, processing, refining, mining, or agriculture." IC § 6-2.5-5-30(2). This latter paragraph of the statute recites a "laundry list" of economic activities nearly identical to those in the exemption statutes of IC §§ 6-2.5-5-3(b), -5.1(b) and -6 (hereafter collectively "the industrial exemptions"). It was therefore fitting that in *Mechanics Laundry* the Indiana Tax Court interpreted all four of these "laundry lists" harmoniously to make production a prerequisite to receiving any of these exemptions. *Compare* 650 N.E.2d. at 1227-32 (industrial exemptions) *with id*. at 1232 (the environmental quality exemption). The Tax Court repeated this holding as to IC §§ 6-2.5-5-6 and -30 in *White River Environmental Partnership*. 694 N.E.2d at 1250 (quoting *Mechanics Laundry*,

650 N.E.2d at 1228 and *Indianapolis Fruit*, 691 N.E.2d at 1384, which dealt with the exemptions of IC §§ 6-2.5-5-1 and -2 (hereafter "the agricultural exemptions") as well as that of IC § 6-2.5-5-3 for industrial machinery, tools and equipment). The law on this subject is therefore well settled, and the Department will accordingly hereafter refer to IC § 6-2.5-5-30(2) as construed in the foregoing opinions as imposing "the production requirement." Because the Tax Court has made meeting the production requirement a prerequisite to claiming the environmental quality exemption, and because the taxpayer has devoted the majority of its brief to arguing that it is engaged in production, the Department will address this issue first.

E. THE TAXPAYER'S ACTIVITIES WERE NOT PRODUCTION AND DID NOT MEET THE PRODUCTION REQUIREMENT.

1. A Taxpayer Claiming the Environmental Quality Exemption Must Be Engaged in One of the Businesses or Occupations Listed in IC § 6-2.5-5-30(2).

a. The Department Must Interpret the Environmental Quality Exemption Consistently With the Industrial and Agricultural Exemptions.

The taxpayer has argued that the disputed items are exempt because the taxpayer was engaged in production, i.e. that its activities met the production requirement of IC § 6-2.5-5-30(2). Specifically, the taxpayer contends that its actions concerning the herbicide constitute processing, refining or agriculture.

The Department noted earlier in this Discussion that the Tax Court held in *Mechanics Laundry* that the environmental quality exemption of IC § 6-2.5-5-30 must be interpreted consistently with the industrial exemptions of IC §§ 6-2.5-5-3(b), -5.1(b) and -6. 650 N.E.2d at 1232. The logic of this holding also dictates that the Department must interpret IC § 6-2.5-5-30 consistent with the agricultural exemptions of IC §§ 6-2.5-5-1 and -2. "[S]tatutes that apply to the same subject matter must be construed harmoniously…, giving effect, if possible, to every word and clause." *Caylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue*, 569 N.E.2d 765, 768 (Ind. Tax 1991), *aff'd* 587 N.E.2d 1311 (Ind. 1992). Accordingly, the environmental quality exemption not only must be construed consistently with the industrial and agricultural exemptions, but the latter two groups of exemptions must be construed consistently with each other in relation to the environmental quality exemption. *See id* (gross income tax exemption opinion).

b. The "Business or Occupation" Test and Its "Continued or Regular Activity" Requirement

(i) The "Business or Occupation" Test.

All of these statutes refer either to a business or an occupation, either explicitly or because the Indiana Tax Court has interpreted them as doing so. IC § 6-2.5-5-30(a)(2) requires that "the person acquiring the [tangible personal] property [claimed as exempt be] engaged in the *business* of manufacturing, processing, refining, mining, or agriculture." *Id* (emphasis added). Similarly, IC § 6-2.5-5-5.1(b) requires that the taxpayer acquire the property for consumption "*in the person's business*," *id.* (emphasis added), while IC § 6-2.5-5-6 requires that the taxpayer acquire

the property to incorporate it into other tangible personal property … for sale *in his business*." *Id* (emphasis added). Although IC § 6-2.5-5-3 does not state that the taxpayer claiming the industrial equipment exemption must be "in business," the Indiana Tax Court has interpreted that exemption as including that requirement; "*like the equipment exemption,* the environmental quality exemption requires the person acquiring the property to be engaged *in a business* within the ambit of subsection (2)." *Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue*, 633 N.E.2d 359, 363 (Ind. Tax 1994) (emphases added) ("*Indiana Waste I*"). Both IC §§ 6-2.5-5-1(2) and -2(b)(2) require that the person acquiring the property [be] *occupationally engaged* in the production of food or commodities which he sells for human or animal consumption or uses for further food or commodity production[.]" *Id* (emphasis added). So do the regulations implementing IC §§ 6-2.5-5-1 and -2. *See* 45 IAC §§ 2.2-5-1(a) and -3(a) (defining "farmers"). *See also* 45 IAC §§ 2.2-5-3(c)(1) and -4(a), which require the taxpayer claiming an agricultural exemption to be "*occupationally* engaged in the *business* of producing food and agricultural commodities for human, animal, and poultry consumption" for sale or for further use in producing food and commodities for sale (emphases added). The Department will hereafter refer to the "in … business" language in the environmental quality and industrial exemptions and the "occupationally engaged" language in the agricultural exemptions as imposing the "business or occupation test."

(ii) The "Continued or Regular Activity" Requirement

The definitions of "business" and the noun "occupation," from which the adverb "occupationally" derives, both require that the activity in question occur on a continual or regular, as distinguished from an isolated, occasional or incidental, basis. Indiana judicial precedent, the rules of statutory interpretation and published Department policy in existence during the taxpayer's audit period all dictate this result. Most of the Indiana judicial opinions that define these words deal with interpreting the provision typically found in a homeowners insurance policy that excludes from coverage pursuits or property the that policy defines as being "business." In *American Family Mutual Insurance Co. v. Bentley*, 352 N.E.2d 860 (Ind. Ct. App. 1976) ("*Bentley*"), the Court of Appeals said that "the general rule, which we hereby adopt in Indiana, is that an insured is engaged in a business pursuit only when he pursues a *continued or regular* activity for the purpose of earning a livelihood." *Id.* at 865 (emphasis added). In *Asbury v. Indiana Union Mutual Insurance Co.* 441 N.E.2d 232 (Ind. Ct. App. 1982) ("*Asbury*"), the Court of Appeals reaffirmed that "the controlling rule in Indiana is as pronounced in *Bentley*, that an insured is engaged in business only when he pursues a *continued or regular* activity for the purpose of earning a livelihood." *Id.* at 239 (emphasis added). Before doing so, the Court of Appeals had quoted extensively from *Home Insurance Company v. Aurigemma*, (1965) 45 Misc.2d 875, 257 N.Y.S.2d 980, 985 ("*Aurigemma*"), which in turn had given several dictionary definitions of "business" and "occupation." The final quoted paragraph summarized these definitions as follows:

> [I]t is clear that two elements are present in almost every definition, either expressly or by implication: *first, continuity, and secondly, the profit motive.* As to the first, there must be a 'customary engagement' or a 'stated occupation'; as to the latter,

> there must be shown to be such activity as a 'means of livelihood'; 'gainful employment'; 'means of earning a living'; 'procuring subsistence or profit'; 'commercial transactions or engagements'."

441 N.E.2d at 237, quoting *Aurigemma*, 257 N.Y.S.2d at 985 (emphases in *Aurigemma*). The Indiana Supreme Court later adopted *Asbury*'s restatement of the "continuous or regular activity" test in *Youngblood v. State*, 515 N.E.2d 522, 527 (Ind. 1987) ("*Youngblood*"), making it one of the two general definitions of "business" under Indiana law which that opinion gives.

The requirement that a business or occupation be engaged in continuously or regularly also applies as a matter of statutory interpretation to "business" as used in the environmental quality and industrial exemptions and to "occupationally engaged" as used in the agricultural exemptions. Where there is no definition in the Indiana Code, "words and phrases [in that code] will be taken in their plain or ordinary and usual sense unless a different purpose is clearly manifest by the statute itself, …." *Indiana Dep't of State Revenue v. Colpaert Realty Corp.*, 109 N.E.2d 415, 418-19 (Ind. 1952) (quoting a predecessor to IC § 1-1-4-1(1)). The ordinary, contemporary, common meaning of a non-technical word in a statute is the meaning found in English language dictionaries in existence at the time of the statute's enactment. *Perrin v. United States*, 100 S.Ct. 311, 314 (U.S. 1979). The requirement that the taxpayer claiming the environmental quality exemption be "in … business" has existed since 1965 under the industrial consumption and incorporation exemptions, and under the environmental quality exemption since its original enactment in 1980. *See* ch. 232, sec. 7, 1965 Ind. Acts 556, 572 and Pub. L. No. 53, sec. 2, 1980 Ind. Acts 621, 621-22, respectively (each so stating). The requirement of being "occupationally engaged" in farming in order to claim the agricultural exemptions has existed since the Gross Retail and Use Tax Act first became law. *See* ch. 30 (Spec. Sess.), 1963 Ind. Acts 60, 63 (so stating). The definitions of "business" and "occupation" quoted in *Aurigemma* and *Asbury* all come from dictionaries published before these respective enactment dates. The element of "continuity" that those opinions inferred from those definitions for an activity to be a business or occupation therefore must exist for a taxpayer engaging in that activity to claim the agricultural, industrial or environmental quality exemptions.

When the General Assembly in 1980 passed the act that recodified the sales and use tax laws as current IC chapter 6-2.5, it stated that

> [t]his act is intended to be a codification and restatement of applicable or corresponding provisions of the laws repealed by this act. If this act repeals and reenacts a law in the same form or in a restated form, the substantive operation and effect of that law shall continue uninterrupted.

Pub. L. No. 52, subsec. 3(a), 1980 Ind. Acts 590, 620. By doing so, the legislature carried forward into current law the requirement of continuous or regular activity to claim the agricultural and industrial exemptions for tangible personal property used in an occupation. Moreover, in 1976, four years before the recodification, the Court of Appeals in *Bentley* had

explicitly defined "business" as being a "continued or regular activity[.]" 352 N.E.2d at 865. The legislature is presumed to be aware of the common law in enacting legislation and is further presumed not to intend to make any change in the common law beyond what it declares either in express terms or by unmistakable implication. *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 10 (Ind. 1993). The 1980 General Assembly was therefore presumably aware of the definition of "business" that *Bentley* adopted from the majority of common law opinions of other jurisdictions. This awareness included an awareness of the requirement that the activity in question be continued or regular. The legislature used "in… business" language in enacting the environmental quality exemption and left "in … business" and "occupationally engaged" language in the recodified agricultural and industrial exemptions, instead of omitting such language. By making that choice, the legislature presumably intended that a taxpayer claiming any of these exemptions must engage in the productive activities they describe on a continued or regular basis and that the term "occupationally engaged" and the phrase "in … business" as used in these statutes be considered synonymous. There is nothing in any of these statutes to indicate otherwise. This "continued or regular activity" interpretation is also consistent with an interpretation of the agricultural exemptions the Department had published before the present taxpayer's audit period began equating being "occupationally engaged" with being "regularly engaged." Sales Tax Information Bulletin No. 9, "Agricultural Production Exemptions" at 2 (1992) (so stating).

Accordingly, and consistently with *Bentley, Aurigemma, Asbury* and *Youngblood,* the Department construes the environmental quality, industrial and agricultural exemptions as all requiring that a taxpayer claiming any of them engage in a listed productive activity on a continued or regular basis. Isolated or occasional productive activities, or productive activities engaged in as an incident to another continued or regular activity, will not qualify tangible personal property used in such activities for the environmental quality, industrial or agricultural exemptions.

c. The "Double Direct" Test

IC §§ 6-2.5-5-1, -2, -3(b) and -5.1(b) (the first two of which, as previously noted, explicitly impose an occupational requirement) all impose what reported Indiana judicial opinions have come to call the "double direct" test. The tangible personal property for which a taxpayer claims any of these exemptions must be "*direct[ly] use[d]* in … direct production" of the product in question. IC §§ 6-2.5-5-1(1), -2(a) and -3(b) (emphasis added). In the case of IC § 6-2.5-5-5.1(b), the property must be "direct[ly] consum[ed] … in … direct production[.]" *Id. Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520 (Ind. 1983) ("*Cave Stone*") established the definitions of "direct use" and "direct production" that are still used to interpret and apply the "double direct" test. The "direct use" (or, in the case of IC § 6-2.5-5-5.1(b), the "direct consumption") to which the exemption in question refers must be "by the purchaser, not some other entity[.]" 457 N.E.2d at 525.

In *Indiana Waste I,* the Tax Court held concerning the industrial equipment exemption that

> [Indiana] Waste Management fails to show it is entitled to the exemption because the minimum threshold requirement of the double direct standard is that the taxpayer who purchases the equipment in question be the entity that uses the equipment "for *his* direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." IC § 6-2.5-5-3(b) (emphasis added [by the court]). *See Cave Stone*, 457 N.E.2d at 525. Waste Management, though, does not engage in any of the listed activities. It simply transports garbage. That it compresses the garbage is irrelevant: *to have a colorable claim for the equipment exemption, it would have to compress the garbage as part of its own process to produce other tangible personal property, not as part of an alleged process of another taxpayer. If there is an integrated production process involving the garbage that will satisfy the double direct standard of the equipment exemption,…, it is Ogden Martin or Danville RDF* [the companies receiving the garbage] *that employs it, not Waste Management.* [The taxpayer in *Indiana Waste I* compacted and hauled garbage to these two companies for them to sell as generator fuel to electric utilities.]

633 N.E.2d at 362-63 (footnote omitted; second emphasis added). As to the environmental quality exemption the Tax Court said that

> Waste Management fares no better under this exemption than under the equipment exemption. Waste Management is simply not "engaged in the business of manufacturing, processing, refining, mining, or agriculture," as required by subsection [IC § 6-2.5-5-30](2). Rather, Waste Management is engaged in the business of picking up, transporting, and disposing of garbage. Even if either or both Ogden Martin and the corporation that operates Danville RDF are engaged in a business within the ambit of subsection (2), Waste Management cannot claim the benefit; *like the equipment exemption, the environmental quality exemption requires the person acquiring the property to be engaged in a business within the ambit of subsection (2).*

Id. at 363 (emphasis added). The Tax Court read the list of activities in IC § 6-2.5-5-3(b) as also imposing a requirement that a claiming taxpayer be engaged in a business or occupation involving one or more of those activities. The Department similarly construes the environmental quality exemption and all of the industrial and agricultural exemptions as requiring that a taxpayer claiming any of them be engaged in one or more of the businesses or occupations that those statutes respectively list.

2. The Taxpayer Was Not Engaged in Processing or Refining Herbicide.

Contrary to the present taxpayer's assertion, it was not engaged in processing or refining herbicide. In *Mechanics Laundry*, the Tax Court had also used 45 IAC § 2.2-5-10(k), which defines "processing or refining" under IC § 6-2.5-4-2 and makes the two activities synonymous, to

define the same words as used in the industrial equipment exemption of IC § 6-2.5-5-3(b). 650 N.E.2d at 1229. That regulation defines "processing" or "refining" as being the "performance *by a business* of an integrated series of operations which places tangible personal property in a form, composition, or character *different from that in which it was acquired.*" *Id* (emphases added). Although the additives did change such herbicide into which they were mixed, the mixing activities failed the "continued or regular activity" requirement of the "business or occupation" test. That is to say, the additive mixing activities were not "continued or regular" as *Bentley, Aurigemma, Asbury* and *Youngblood* use this phrase. The taxpayer has neither claimed nor proved that these activities were more than isolated or occasional. It therefore has not proved that the mixing activities constituted a "business" as these opinions define those words and as the environmental quality and industrial exemptions and 45 IAC § 2.2-5-10(k) all require.

The taxpayer was in the business of warehousing, not processing or refining. The taxpayer stored agricultural supplies for hire. It was therefore a "warehouseman" as IC § 26-1-7-102(1)(h) defines that word, and as such was subject to the same duties that Article 7 of the U.C.C., IC chapter 26-1-7, imposes on all warehousemen. "A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances …." IC § 26-1-7-204(1). *See also* IC § 26-1-7-403(1)(b) (requiring the bailee to deliver the goods to a person entitled under the document of title unless the bailee establishes, among other things, damage, loss, or destruction of the goods for which it is not liable). The taxpayer's agitation, filtration and packaging activities did not change the herbicide, but simply maintained it in the same condition that the taxpayer received it. As such, those activities were no different than the duty imposed on all warehousemen to exercise reasonable care to preserve the goods in their possession from damage or destruction. *Compare Mechanics Laundry,* 650 N.E.2d at 1229-30, in which the court described the taxpayer's laundering of soiled textiles as perpetuation, rather than processing or production, of those textiles. The court in that case denied the taxpayer any refund under the industrial exemptions for gross retail tax it paid on tangible personal property that it used in rendering that service. *Id.* at 1227-32. It also denied the taxpayer any refund of that tax based on the environmental quality exemption, holding that it had to construe the word "processing" in IC § 6-2.5-5-30 as having the same meaning as that word was used in the industrial exemption statutes. *Id.* at 1232. Therefore, viewed from a sales and use tax perspective, the taxpayer's agitation, filtration and packaging activities constituted perpetuation, rather than production, of goods.

It has also been held that where the source of a taxpayer's income is rental charges, any services the taxpayer renders in connection with the rental are incidental to the lessee's objective in renting. *Indiana Dep't of State Revenue v. Commercial Towel & Unif. Serv.,* 409 N.E.2d 1121, 1123 (Ind. Ct. App. 1980) ("*Commercial Towel*"). In contrast to *Bentley,* in which the insured was not trying to earn his living from storage charges and who in any case did not receive them long enough to be "continuous or regular," the taxpayer's main source of income was the rent or storage charges paid by its agrichemical manufacturer lessees. Therefore, and aside from the taxpayer's statutory duties as a warehouseman, the Department further views the activities that the taxpayer claims were processing or refining as having been for tax purposes nothing more than services that the taxpayer rendered to its manufacturer lessees incident to their respective storings of herbicide

The object of all of the taxpayer's previously described incidental services was to preserve and facilitate its lessees' sale and the safe and convenient transportation and application of herbicide. The holdings of *Bentley, Aurigemma, Asbury, Youngblood, Mechanics Laundry* and *Commercial Towel* therefore all dictate that the present taxpayer is not entitled to relief from the assessment on the theory that it is a processor or refiner.

3. The Taxpayer Was Not Engaged in Manufacturing Herbicide.

Nor did the taxpayer's activities concerning the herbicide or additives constitute manufacturing. "Manufacturing," as the industrial and environmental quality exemptions use that word, contemplates resale. *See Mumma Bros. Drilling Co. v. Department of Revenue,* 411 N.E.2d 676, 678 (Ind. Ct. App.), *reh'g denied* (1980) (so holding as to the industrial equipment exemption). However, the taxpayer did not purchase any herbicide from any of its manufacturer lessees, so it could not have resold any herbicide. There is also no evidence before the Department that the present taxpayer prepared the additives itself. Its position is thus distinguishable from that of the taxpayer in *Mechanics Laundry,* in which the court did allow that taxpayer to claim the industrial equipment exemption in connection with its production or manufacturing of the logos and name tags for the uniforms it laundered. 650 N.E.2d at 1230. The holding of *Indiana Waste I* quoted above, 633 N.E.2d at 363, concerning the environmental quality exemption therefore bars the taxpayer from entitlement to this exemption on the theory that it was a manufacturer.

4. The Taxpayer Was Not Engaged in Agriculture.

Lastly, the taxpayer was not engaged in agriculture as Indiana law defined it by 1991, when the containment regulations took effect and the taxpayer was required to comply with them. Well-settled Indiana judicial precedent defined "agriculture" as "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry." *Fleckles v. Hille,* 149 N.E. 915, 915-16 (Ind. App. 1925) ("*Fleckles*"), adopted in *H.J. Heinz Co. v. Chavez,* 140 N.E.2d 500, 502 n.1 (Ind. 1957) ("*Chavez*"). By 1991, the federal and Indiana appellate courts had both further held that not every kind of work, task or duty related to agriculture is agricultural. In *Farmers Reservoir & Irrigation Co. v. McComb,* 69 S.Ct. 1274 (U.S)., *reh'g denied* 71 S.Ct. 31 and 32 (1949) ("*Farmers Reservoir & Irrigation*"), the U.S. Supreme Court had succinctly observed that "the conclusion that [a type of] work *is necessary* to agricultural production does not require [saying] that it *is* agricultural production." 69 S.Ct. at 1277 (emphases in original). The Court explained this statement later in its opinion as follows:

> [F]unctions which are necessary to the total economic process of supplying an agricultural product, become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer part of it. Thus, *the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture* nor by the physical similarity of the activity to that done by farmers in other situations. *The question is whether the activity in the*

> *particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.*

Id. at 1278, quoted in *Day v. Ryan*, 560 N.E.2d 77, 83 (Ind. Ct. App. 1990) (emphases added by the Department). Accordingly, the Department interprets the mention of "agriculture" in IC § 6-2.5-5-30(2) as referring to "agriculture" as defined by *Fleckles* and *Chavez* and limited by *Farmers Reservoir & Irrigation* and *Ryan*.

The taxpayer did not engage in "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, [or] the raising, feeding and management of live stock or poultry." *Chavez,* 140 N.E.2d at 502 n.1, quoting *Fleckles,* 149 N.E. at 915-16 (internal quotation marks omitted). Its activities, while necessary to agriculture, were economically independent of it, particularly so given that, as discussed above, the taxpayer did not derive its revenues from farmers, but from the rent or storage charges paid by its manufacturer lessees. Given this circumstance and the scope of the legal definition of "agriculture," the Department finds that the taxpayer was not "engaged in the business of … agriculture" within the meaning of IC § 6-2.5-5-30(2).

5. Summary and Conclusion of Production Requirement Analysis

In short, the taxpayer was not engaged in processing, refining, manufacturing or agriculture concerning its herbicide operation. Moreover, notwithstanding the taxpayer's assertion that it constructed the buildings to comply with both the commercial fertilizer and pesticide containment regulations, the taxpayer discussed in its brief only the actions it performed in connection with herbicide. The Department therefore cannot view taxpayer's discussion of its herbicide activities as also applying to any fertilizer activities in which it may have been engaged, and accordingly rules that the taxpayer has waived any argument as to the latter activities.

The taxpayer was acting as a warehouseman of the herbicide, and the Department has no evidence before it that the taxpayer was not acting as a warehouseman of the fertilizer as well. Warehousing is not listed in IC § 6-2.5-5-30(2) as one of the businesses entitled to claim the environmental quality exemption. Accordingly, the Department finds that the taxpayer has failed to prove the production requirement of IC § 6-2.5-5-30(2). These failures of proof would be enough by themselves for the Department to deny the taxpayer the environmental quality exemption for its use of these items, even if it had satisfied the environmental compliance requirement. However, as the Department will discuss below, the taxpayer has also failed to satisfy that requirement as to one disputed capital asset.

F. THE TAXPAYER'S ACQUISITION AND USE OF THE SHOWER/EYE WASH DOES NOT MEET THE ENVIRONMENTAL COMPLIANCE REQUIREMENT.

The shower/eye wash that the taxpayer bought fails to meet the environmental compliance requirement because it does not protect the environment. Rather, it protects those of the taxpayer's employees who might come into direct contact with discharged fertilizer or herbicide within the operational area. The interior of a workplace is not part of the environment for purposes of the environmental protection laws. *E.g., Covalt v. Carey Canada, Inc.,* 860 F.2d

1434, 1439 (7th Cir. 1988). *Cf. Indiana Dep't of State Revenue v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974) (denying the industrial equipment exemption to air conditioning equipment the taxpayer used to control internal temperature of its manufacturing plant). The present taxpayer thus could not have acquired or used the shower/eye wash for an environmental protection purpose, and as a result it does not qualify for the environmental quality exemption for this additional reason as well.

G. CONCLUSION

The taxpayer has thus failed to prove that it met the production requirement of IC § 6-2.5-5-30(2) as to any of the items, or the environmental compliance requirement of IC 6-2.5-5-30(1) as to the shower/eye wash. For these reasons, it has failed to sustain its burden of proof under IC §§ 6-2.5-5-30 and 6-8.1-5-1(b) that its use of the disputed items fell under the environmental quality exemption and that the assessment is therefore wrong.

FINDING

The taxpayer's protest is denied.

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